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Supreme Court of the United States.

October Term, 1926.

No. 61.

THE LOUISVILLE & NASHVILLE RAILROAD COMPANY,

Appellant,

v.

THE UNITED STATES.

BRIEF FOR APPELLANT

BENJAMIN CARTER,
Attorney for Appellant.

Index of Subjects.

Special tariffs of rates established for the transportation of private passengers, paying their own way, are not applicable to passengers traveling on Government account.

Special tariffs of rates established for the transportation of private passengers paying their own way are applicable to transportation of Government account only when, and to the extent that authorized officers of the railroad companies tender them by formal contract or by bills presented after the services

Special tariffs of rates established for the transportation of private passengers paying their own way, which, by express terms or by necessary implication, provide for cash payment in advance, as a condition to such rates, are not applicable to passengers traveling on Government account.

A bill rendered by a railroad company for passenger services, stating only the fare per capita, and computing the compensation at that rate, cannot be construed a gross rate, subject to deductions.

The granting of credit to the Government for transportation in cases where advance payment is exacted of the carriers, although it may be lawful, is such an essential difference of service that the carriers may not be compelled to accept from the Government the rates to which private passengers are entitled

An individual passenger rate established for a specified number of passengers cannot be applied in any less number of passengers.

Transportation requests, on which transportation of passengers is furnished by railroad companies to the Government, are not cash nor the legal equivalent thereof.

A station agent of a railroad has no power to concede and establish for the transportation of passengers any fares or conditions other than those fixed by the companies and regulations of the company and the laws.

A railroad ticket furnished by the station agent of the railroad company under a Government transportation request does not give any validity to the rate or condition of which the company avails thereunder

A station agent, unless by authority from his superior officer, cannot waive a condition attaching by a tariff to fare named.

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This is a novel case, being concerned with passenger fares for parties of ten or more persons, established by various railroad tariffs, and the liability of the same to land-grant deductions when tendered by the carriers, without such deductions, to the Government. These tariffs fixed rates for private parties on the flat basis of two cents per mile per capita.

In some instances a single passenger, sometimes more than one, but less than ten, and sometimes ten or a greater number were transported on one transportation request.

Some of the party rate tariffs provided that cash should be paid at the time the tickets were issued

and that there should be no land-grant deductions made from such party rates. Others provided neither for cash at the time the tickets were furnished nor against land-grant deductions from such party rates.

In the transactions sued-on claimant's Auditor of Receipts, using the form of bill prescribed by the War Department for flat claims, not subject to deductions, applied the identical rates of these party tariffs; but the disbursing and accounting officers of the Government made the same proportionate deductions as if the bills had been made at the full rates of the commercial tariffs.

Against the reductions of compensation so made, except some items of one bill, viz., 2402, claimant, when accepting payment, protested against the reductions.

The distinguishing feature in the instant case is the combination of land-grant reductions with those which were involved in the construction of the net party rates. The argument is that, under the previous adjudications, the party rates were not valid as applied to the Government, but that they became valid when an additional reduction was made on the score of land-grant.

The Government's contention is that it is a discrimination against the Government—notwithstanding the difference between Government traffic and private traffic, as regards methods of the same and accounting therefor—not to charge the same rates for both, and so, therefore, that any special rates established for traffic over land-aided track at those rates, just as those made at full tariff rates, is subject to reductions. Appellant's argument,

amply supported by decisions of the Federal courts, treating especially of the "cash" question, is that the differences between the two classes of traffic are sufficient to make the party tariffs inapplicable to any Government traffic.

There also were in force at the same time on appellant's lines special tariffs for the switching of cars between the terminal points on these lines proper and near-by camps reached by short lines.

ASSIGNMENT OF ERRORS

Appellant assigns as error action of the court as below:

(1) In approving passenger rates constructed by making deductions from rates offered by the carrier as net rates, not subject to any deductions.

(2) In approving, as bases for rate-making, rates offered by the carrier as net rates.

(3) In applying to transportation for Government account tariffs of special rates which by their terms were restricted to private transportation.

(4) In applying to transportation for which cash was not paid in advance tariffs of special rates which stipulated for such advance payment as a condition.

(5) In taking, as bases for Government transportation, from which to make land-grant deductions, tariffs of rates which were not applicable to private transportation in the actual conditions of the transportation performed.

(6) In disallowing arbitraries or special rates for transportation to and from Government camps in

addition to the charges to or from points on the main lines through which the traffic passed.

(7) In disallowing special charges for switching of cars between Government camps and points on the main lines through which traffic passed.

AUTHORITIES AND ARGUMENT

The chief issues in this case are (1) the right of the Government, in transporting troops, to avail generally of party rates, which, by their express terms or by necessary inference, were restricted to passengers traveling on private account; (2) the condition laid down to the Government, as to private passengers, in tariffs governing some of the movements in question, that cash be paid in advance, and (3) the right of the Government, when the option was offered to it, of paying (a) net party rates, or (b) ordinarily tariff rates with land-grant reductions, of combining the two privileges by making land-grant reductions from the amounts accruing and claimed by the net rates.

The rights and immunities involved on the Government's party are those of a contractor, not a sovereign; and these questions are subject to the same tests as though private individuals, instead of the Government, were concerned.

Every grant of public lands to and acceptance of the same by a railroad company is a contract. So this court has declared time and time again.

The earliest of these private party tariffs was put into effect on January 1, 1901. It provided that tickets for theatrical or sporting parties or the like, in lots of ten to nineteen, would be sold at two and

one-half cents per mile, and the first modification was made in April, 1901. For thirty years before that time the practice had been to allow transportation to the Government, under the ordinary tariffs, without cash payment. The railroads did not charge it any greater compensation than was paid by private passengers, except as was due to the latter by issuing party tickets, nor did it charge any more for soldiers, less than ten in number, than for the general public. About 1899 the Government for the first time made claim that for ten or more soldiers it was entitled to the party rates. Resistance was made by the railroad companies as soon as feasible in the circumstances, and in February, 1905, two judgments were recovered at the Court of Claims, in cases of the Chicago & Northwestern Railway Company and the Chicago, Rock Island & Pacific Railway Company. A number of other cases followed, all with the like result. Inevitably a large part of the time between 1901 and 1910 was consumed in discussion of this new claim set up by the Government. So for some thirty years the Government accepted service from the railroad companies at the ordinary rates, with reductions for land-grant only; and for, say, four years afterward, the same service was accepted on the same scheme of rates, but with the admonition that the railroad companies would fight for any amounts withheld.

It had been supposed since 1904 that the exacting of cash from one customer and the granting of credit to another, while just in some conditions, was a discrimination. The Circuit Court of Appeals for the Seventh Circuit, in deciding the case of the

Chicago & Northwestern Railroad Company, 127 Fed. 785, in that year, said:

The Government of the United States in buying transportation for its soldiers in lots of ten or more is not entitled to the benefit of a reduced ten party rate given by the railroad company's schedule to "theatrical, operatic or concert companies, hunting and fishing parties, glee clubs, brass or string bands, boat, baseball, polo or tennis clubs, football teams and other parties of like character." Nor does the refusal to give it the same rate constitute an unjust discrimination against it or subject it to undue prejudice or disadvantage, in violation of the Interstate Commerce Act, when it is shown that the purpose and effect of the party rate given by the schedule is to increase the company's business, and that tickets sold thereunder are closely limited in time and are paid for in cash in advance, while those furnished to the Government are not so limited, are furnished on a requisition and are only paid for after delay in the auditing and allowance of the claims by the War and Treasury Departments. In such case the conditions and circumstances under which the service is rendered are essentially different and justify the making of different rates.

This [giving of credit to the Government] must always constitute a material difference, so long as commodities can be sold cheaper for cash than on credit (p. 791).

The Government in the transportation of soldiers does not financially or in any other way come into competition with any of those parties who are given the party rates (p. 791).

* * * * * * *

It will often happen when such parties travel one way over a line of road their occasion will lead them to travel back the same way, so that the patronage of the road is doubled, and generally what is a

benefit to the railroad companies by way of increase of business is a benefit, also, to the public upon which they rely for support (p. 790).

* * * * * * *

The giving of the party rates stimulates other travel and that is one purpose, no doubt, of giving them, whereas the transportation of soldiers can have no such effect (p. 790).

* * * * * * *

This was a test case, so made by agreement of a number of railroad companies. Naturally, the decision has carried great weight. In United States v. Wells Fargo Express Co., this case was cited with a number of others differing, somewhat broadly in facts, for the proposition that the denying to the Government of party rates allowed to theatrical parties and others of like kinds is not a discrimination within the meaning of sections one and two of the Hepburn Act.

The case of Wight v. United States, 167 United States 512, decided in 1897, was concerned with rebates allowed to one railroad company because it had no side connection. This practice was held to be obnoxious to the "discrimination" clauses of the Interstate Commerce Act, the transportation as a whole *being* "under substantially similar circumstances and conditions."

Interpreting the Wight case in Delaware L. & M. R. Co. v. I. C. C., 166 Fed. 489 (510), in connection with the Chicago & Northwestern case, the court said that whether all of the reasons assigned by the court in the Chicago & Northwestern case, in view of the decision of the Wight case, had been considered and seriously questioned by the Commission; but

"the factor remains that Judges Grosscup, Baker, and Bunn did consider the facts stated seven years before (1908) as constituting dissimilarity." The reasonable inference, the court says, is that the reasons stated came within the term "matter of carriage," as used in the Wight case as being one of the conditions precedent or subsequent, as distinguished from the question of competition.

In 1914 the United States Court of Appeals for the Sixth Circuit, in the case of the Hocking Valley Railway Co. v. United States, 210 Fed. Rep. 735, interpreted the provisions of the Interstate Commerce Acts relative to a carrier's "failure to observe tariffs." This was a criminal proceeding, and therefore any substantial doubt as to the meaning of the statute was to be resolved in the carrier's favor. The matter concerned was the acceptance by the carrier from one shipper of promissory, negotiable notes, payable four months after shipments, with 5 per cent interest. The court held that these instruments were not cash or the equivalent thereof; that the acceptance of the same was a discrimination against shippers who paid cash, and therefore a failure to observe the tariffs.

On application to the United States Supreme Court, a writ of certiorari for review of this decision was denied (234 U. S. 757). The case has been cited now and then in subsequent decisions, but without modification in the particular here stated.

The "Settled Practice" Is Adverse to the Government.

The phrase "settled practice" has been wrongly

used in reference to the use of the private party rates by the Government. For about forty years it paid, not those net rates, but the full tariff rates, with proper reductions for land grants. During the twenty-five years following there has been a continuous contest outside or in the Court of Claims, during which years all cases, except one decided in 1923 and the instant case, were decided adversely to the Government.

There never has been a settled practice of paying for Government transportation at the rates of the private party tariffs.

The following Court of Claims cases, all decided in favor of the carrier, were decided in the years 1904 to 1910:

Chicago & Northwestern Ry. Co., 40 Ct. Cls., 536;
Chicago, Rock Island & Pacific Ry. Co., Ct. Cls., 536, ib. same page;
Chicago & Alton R. R. Company, 41 Ct. Cls., 513;
Missouri Pacific Ry. Co., 44 Ct. Cls., 603;
Chicago, Burlington & Quincy, 45 Ct. Cls., ~~519~~ 670;
Denver & Rio Grande R. R. Co., 46 Ct. Cls., 690.

The Government Had Its Option to Pay the Full Party Rates or Land-grant Rates.

When the instant case came to bar it seemed to be settled beyond dispute in the Court of Claims that when the Government makes a special contract with a carrier for a special service, it must pay the rates fixed for that service instead of those established

by the ordinary tariffs for the ordinary service (Cases of Baltimore & Ohio R. R. Co., 56 Ct. Cls., 384; Los Angeles & Salt Lake R. R. Co., 55 Ct. Cls., 305; Yazoo & Mississippi Valley R. R. Co., 54 Ct. Cls., 165; Southern Pacific Co., 53 Ct. Cls., 332; Bush, Receiver, 52 Ct. Cls., 199).

In the Baltimore & Ohio case the court said:

"It must be admitted in this case that the railroad company would not have been required under regular tariff to furnish the service it did furnish. Nothing stood in the way of the defendant, if it so desired, to avail itself of the customary mode of transportation furnished to the general public under the regular tariff rates, duly published. The execution of a written contract for the service, if it rises to no greater dignity than an ordinary shipment, was a meaningless performance."

That the difference in the present case relates to the price, instead of the manner of the service, does not seem to be material. The subject of those cases, of course, was options exercised at the times when the service was performed or when the Government's officers obtained the facilities therefor. In the present case the Government had an option, after the service was performed, to avail either of the ordinary tariff rates, with proper land-grant deductions, or of the special party rates, which were not subject to deductions on any account whatever. This option was created by claimant's tender, in its bills rendered, of the party rates. "Nothing stood in the way of defendant, if it so desired, to avail of the customary" scheme of rates applicable to Government transportation; and, after the special ten-

der, by claimant's bills of the party rates, it, the Government, had an equal right to avail of those. It could *not* make land-grant deductions from the party rates; for then it would not apply either the exact rates tendered or those to which it was entitled by the tariffs and land grants.

The party-rate tariffs were not open by their terms to the Government or anyone else who did not pay cash in advance of transportation; and it is indeed analomous if, by escaping cash payment, the Government may get the right to pay something less than the rates of those tariffs.

The Carrier Waived Nothing Except Its Right to Ordinary Government Rates.

Sometimes the courts have said that a special con- had been waived by some action of railroad officers. If there was any waiver in this case, it was made by claimant's Auditor of Receipts, who compiled and presented bills to the Government's disbursing or accounting officers. He, in effect, said "Although you did not pay in advance for the transportation, the company will accept from you the same fares that were prescribed by the tariffs carrying this cash provision." Surely this is all he said. He did not say: "You may apply these identical, reduced rates (assuming that they are lower than land-grant rates) and then make land-grant deductions therefrom." Use of a flat-rate bill-form shows that he was not consenting to land-grant abatements from the party rates. Significance is given to this fact by the opinion of the Court of Claims in the South-

ern Pacific Co.'s case, 59 Ct. Cls. 36, decided on January 7, 1924. There it is said:

"All of plaintiff's bills for transportation here involved were stated upon the regular approved form of voucher for such transportation of passengers as was subject to land-grant deduction, and by 'approved' form is meant a form prescribed by the Comptroller of the Treasury with the approval of the Secretary of the Treasury under authority of the Dockery Act. See 28 Stat. 206, sec. 5. This form required the stating of the claims in separate columns under the following headings: 'Date,' 'No. of transportation request', 'From', 'To', 'Total distance', 'Miles of land-grant road', 'No. of men', 'Rate per man', 'Gross amount', 'Amount to be deducted on account of land grant', and 'Amount claimed'. * * *

The use of this and other forms relating to Government transportation was specifically prescribed by Department Circular No. 62, dated October 29, 1907, issued by the Comptroller of the Treasury with the approval of the Secretary. (14 Comp. Dec. 967.) * * *

At the same time that this voucher form for transportation of passengers subject to land-grant deduction was prescribed appropriate forms were also prescribed for vouchering transportation not subject to land grant. From them the columns headed 'Miles of land-grant road', 'Gross amount', and 'Amount to be deducted on account of land grant' were omitted. (See circular above referred to and Form No. 8 on page 980, same volume.) These and other prescribed voucher forms were available to the railroad companies in such quantities as they might desire, and it was therefore the option of a railroad company, in the first instance, to state its claim on such form as it might deem appropriate thereto."

Nothing occurred from which a waiver by any other representative of appellant could be argued There was no question presented to the station agent for decision, and therefore no rights of the company which he could concede to the Government. Transportation requests were presented to these agents in which nothing was said or suggested in regard to the fares payable. He issued a ticket for each passenger or a group ticket for all, according to specifications in the requests or to his own convenience. He could not refuse to issue the tickets. But neither could he make any special agreement fixing the fares to be paid. If these agents had been called on to make, and had made, express concessions affecting the rates, these would have had no validity, for they would not have been within the actual or implied authority of those functionaries.

An agent of a carrier, unless under general or special authority, actual or presumptive, given by its proper officer, or by custom of the business involved, has no power to contract with a passenger or shipper for a special rate or special services or facilities; and in the absence of proof the agent will not be presumed to have any authority not conferred in the one way or the other.

Chicago & Northwestern Railway Co. v. United States, *sup.*

Chicago, Rock Island & Pacific Railway Co. v. United States, *sup.*

Chicago & Alton Railroad Co. v. United States, *sup.*

Missouri Pacific Railway Co. v. United States, *sup.*

Chicago, Burlington & Quincy Railroad Co. v. United States, *sup.*

Thurman v. Wells, 18 Barb. 500, 515, 516, 518, 519.

Evans v. Atlanta & West Point Ry. Co., 56 Ga. 498.

Missouri Pacific Ry. Co. v. Stults, 31 Kansas 752.

The carriers' counsel in the Chicago & Northwestern and "Burlington" cases argued that:

"A station agent has no more authority to concede a rate unduly low than an officer of the Government had to pay, or promise to pay, a rate unduly high.

The court held this to be a sound proposition.

Other points decided in those cases were that the rights of the parties were not affected by the agents' compliance with another provision of the special tariffs, viz., the issue of a single ticket, nor by notations on the transportation requests of "Party rates" or "Lowest available rate."

It is true that the Interstate Commerce Acts give the Government certain advantages over private shippers. It is not required that special tariffs, relative to Government transportation, be filed with the Commission; and authority is given for special contracts affording the Government lower rates than those paid by private shippers or passengers, or for other special advantages. This, of course, means that an agreement of an officer of the Louisville & Nashville Railroad Company, having authority in the premises, and a like agent of the Government for any special rate or any special condition for the transportation, say, of soldiers or of property of the Government, is valid. It does *not* mean that a mere

station agent, or other representative of the railroad company with limited authority, can bind it by a like agreement with an officer of the Government.

Of course the argument for a waiver of payment in advance assumes that the station agents had the right, otherwise, to exact such payment. There is never a legal waiver of anything to which a lawful claim could not have been asserted.

If "the very nature of things" renders it impossible for the Government to pay cash for transportation, there has been, in the cases cited herein and others, an enormous waste of printers' ink. Were it unthinkable that the Government pay cash when it obtains transportation, why all this pother of judges and lawyers over the law? There is no reason why a Government officer, in charge of transportation to moderate amounts, like quartermasters buying limited amounts of provisions or horse feed, should not carry sufficient supplies of money. Quartermasters do that identical thing. In the Government offices in Washington, millions of currency are disbursed twice a month to the civil list for salaries just then due. Probably nobody ever supposed that the clerks stood in line while the money to pay them was printed or stamped.

Why may not sufficient supplies of currency be supplied to transportation quartermasters before they go to the railroad offices to do business? The Postoffice Department has found a way of paying for mail transportation as soon as the month's services has been footed up and without waiting for any other auditing or adjustments. Revisions are then made at such length of time as may be necessary and the amounts of the over-payments are recap-

tured by the postal authorities out of the next month's vouchers.

Script, payable forthwith to the carrier, signed by the quartermaster and countersigned or receipted by the railroad agent, would be a sort of cash; and to compute the approximate price of the tickets to be written into the script—subject to correction in the auditing offices—would not impose an unreasonable burden on the quartermasters. Doubtlessly, in ninety-nine cases out of a hundred, it would bring a final settlement quicker than the present plan does. In most cases, no doubt, the amount stated would be absolutely correct.

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